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IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-6066

VINCENT X. LEE,

Petitioner,

-vs-

STATE OF MISSOURI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT

VINCENT X. LEE,
Petitioner,

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I N D E X

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PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

Petitioner, VINCENT X. LEE, prays that a writ of certiorari issue to review the judgment and opinion of the Missouri Supreme Court entered in the above-entitled case on October 15, 1977.

OPINION BELOW

The opinion and decision of the Missouri Supreme Court is reported at *556 S.W.2d, 25.* A copy of the opinion appears in Appendix A attached hereto.

JURISDICTION

The judgment of the Missouri Supreme Court (Appendix A) was originally entered on September 27, 1977. Thereafter, on September 29, 1977, a timely motion for rehearing was filed. see, Rule 84.17, Missouri Rules of Court. Petitioner's motion for rehearing was overruled by the Missouri Supreme Court on October 11, 1977. By the aforesaid denial of the motion for rehearing, the opinion and decision of September 27, 1977 became the final judgment of the highest court in the State of Missouri.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

I

WHETHER MISSOURI'S STATUTORY AND CONSTITUTIONAL SCHEME FOR THE SELECTION OF PETIT JURORS -- WHICH GRANTS WOMEN AN AUTOMATIC EXEMPTION BASED SOLELY ON SEX -- DENIED PETITIONER HIS RIGHT TO TRIAL BY JURY AND DUE PROCESS OF LAW AS MANDATED AND INTERPRETED BY THIS COURT'S OPINION IN *Taylor v. Louisiana, 412 U.S. (1975).*

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution:

Sixth Amendment

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,. . ."

Fourteenth Amendment

> ". . . No State shall make or enforce any law which shall abridge theprivileges or immunities of citizens of the United States' nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws."

STATEMENT

Petitioner, VINCENT X. LEE, was charged by indictment with two counts of Murder, First Degree and two counts of Robbery, First Degree. Jury trial was held in the Jackson County Circuit Court (Meyers,J.) in Kansas City. Verdicts of guilt were returned as to each count and Petitioner was sentenced to four terms of life confinement in the Missouri Division of Corrections.

HOW FEDERAL QUESTIONS ARE PRESENTED

1. Prior to trial, Petitioner filed a motion to quash the petit jury panel on the basis that women were systematically excluded from jury service. A hearing was held: John Fitzgerald, Jackson County Jury Commissioner, testified that potential jurors are randomly selected from the Jackson County voter registration lists; these persons are sent questionnaires to determine their eligibility for jury service. By statute, this questionnaire prominently states:

"TO WOMEN:

The Constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service."

See Appendix 11, Exhibit 1. Questionnaires returned showing no exemption were placed in the jury wheel. Evidence was received that the jury wheel was 29.1% female. Each week, names are randomly selected for jury service; these persons are then sent summons for jury service. The summons reads:

"Women, if you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible."

See Appendix 2, Exhibit 2. The Jury Commissioner also testified that if a woman failed to respond to the summons, she was deemed to have exercised her option not to serve. Evidence was also received concerning the number of women appearing for jury service prior to Petitioner's trial. That evidence is as follows: June, 1975 - 15.9% women; July, 1975 - 15.1% women; August, 1975 - 13% women; September, 1975 - 13.7% women; October, 1975 - 10.9% women; January, 1976 - 12.3% women; February, 1976 - 17.6% women; March, 1976 - 15.5% women. Petitioner's panel of ninety (90) had ten (10) women (11.1%) and his jury of twelve was all male. Census data was also received showing Jackson County, Missouri to be 54% women.

At the close of Petitioner's presentation, the State produced no evidence and the motion to quash was overruled.

2. Subsequent to his trial, Petitioner filed a timely motion for new trial alleging the instant allegation. A timely appeal was prosecuted to the Missouri Supreme Court which held consolidated arguments on the cases *State of Missouri vs. Billy Duren; State of Missouri vs. Eugene Minor, State of Missouri vs. Emerson E. Harlin,* and *State of Missouri v. Vincent X. Lee* (petitions for writs of certiorari on these cases are being filed concurrently herewith). The opinion affirming Petitioner's conviction became final on October 11, 1977. The question presented herein was raised and argued before the trial court and the Missouri Supreme Court.

REASONS FOR GRANTING THE WRIT

The opinion and decision of the Missouri Supreme Court in the instant case is in direct conflict with past decision of this Court, various federal courts of appeals and several state high courts. Specifically, Petitioner contends the instant opinion is in conflict with *Taylor vs. Louisiana, 419 U.S. 522 (1975)* and thus, cannot stand. *Taylor* held Article VII, Section 41 of the Louisiana Constitution and Article 402 of the Louisiana Code of Criminal Procedure (since repealed) violative of *Taylor's* due process rights guaranteed by the XIV Amendment to the United States Constitution.

The Louisiana law is reproduced here for the convenience of the Court:

Article VII, Louisiana Constitution

§41. Selection of jurors; women jurors; trial by judge; trial by jury.

The Legislature shall provide for the selection and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishement may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

Louisiana Code of Criminal Procedure

Article 402. Service of women as jurors.

A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

The United States Supreme Court in *Taylor* re-examined the question of automatic exclusion of women from the juries previously decided by that Court in *Hoyt v. Florida, 368 U.S. 57, 7 L.Ed.2d 118, 82 S.Ct. 159 (1961)* and they reached a different result. Accordingly, the Court stated:

"Accepting as we do however, the view that the VI Amendment affords the Defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequences are that criminal jury venires are almost totally male."

(42 L.Ed.2d 690 at 702) [emphasis added]

The question presented herein then whether Missouri offers an "automatic exemption based solely on sex" and if, "the consequences are that criminal jury venires are almost totally male."

The Missouri Constitution, Article I, Section 22(b) states: "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror." This Article is implemented by Section 497.130, Missouri Revised Statutes (1974), which section allows women to "elect to serve or not to serve as jury women."

When placed side by side and examined, the Missouri system and the Louisiana system (later changed) both offer an absolute exemption to jury service based strictly upon gender. The difference being only that in Louisiana the woman must affirmatively opt for service while her Missouri sister must affirmatively choose not to serve.

The Appellant's argument is much better stated by the United States Supreme Court's final paragraph in the *Taylor* opinion:

". . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."

The term "reasonably representative thereof" points out the failing of the panel to which the Petitioner objected. It cannot be said that ten (10) women on a panel of ninety (90) is "reasonably representative" nor does that panel constitute a "cross-section of the community."

Petitioner concludes that "(t)he States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions. . ." *Taylor v. Louisiana, at 538.* Petitioner, however, does not believe that a blanket exemption for women is a reasonable exemption. Indeed, as pointed by Mr. Justice Seiler in his dissenting opinion in *State v. Billy Duren, 556 S.W.2d 11, 24, n.4 (1977):*

"The federal court (the United States District Court for the Western District of Missouri) provides for excuse on request by a woman charged with care of minor children without adequate domestic help."

Petitioner maintains that this is a reasonable exemption for women and would not serve to deny an accused his constitutional right to a representative jury: in the federal court in Kansas City, 53% of the persons on jury wheel are women and 39.8% of the actual jurors chosen were women. *556 S.W.2d at 84.* This data can be contrasted with the Missouri courts: 29% of the persons on the wheel are women; seldom over 15% of the persons appearing for jury service are women; and often, as in the case-at-bar, juries are all male.

Since *Taylor*, several states have been faced with challenges to exemptions to women. All, except Missouri, have changed the exemption by either statute or court decision, see, e.g. *State v. Gethers, 227 S.E.2d 832 (Ga.App.1976); Robinson v. Kimbrough, 540 F.2d 1264 (5th Cir.1976); New York Judiciary Law 549(7); Conn. Gen.Stat.Rev. §51-218, 219; Ga.Code Ann. §59-112(6); La.Stat.Ann. §13-3055; Okla.Stat.Ann. Title 38 §28; Rhode Island Gen.Laws Ann. §9-9-11; Utah Code Ann.§78-46-10(14).* Missouri remains the only state with an automatic exemption for women. Further, this exemption causes gross underrepresentation of women on jury panels. (See attached exhibits as to the women appearing for jury service). The instant opinion cannot stand as a correct interpretation of this Court's opinion in *Taylor*. Unlike the Missouri Supreme Court, Petitioner does not believe *Taylor* stands for the proposition that any percentages of women on jury panels, higher than those found in *Taylor*, is constitutionally permissible; instead *Taylor* condemns jury mechanisms which deny an accused his right to a jury drawn from a reasonable cross-section of society. The Missouri jury selection system is of such a breed: Petitiner's panel (10% women) cannot be considered as representative of society.

Accordingly, a Writ of Certiorari should issue to review the opinion of the Missouri Supreme Court affirming Petitioner's conviction.

CONCLUSION

WHEREFORE, Petitioner respectfully requests this Court to issue a Writ of Certiorari to the Missouri Supreme Court.

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A copy of the above and foregoing was mailed, postage prepaid, on this the 16th day of January, 1978 to Attorney General John Ashcroft, Office of the Attorney General, Supreme Court Building, Jefferson City, Missouri 65101.

LEE M. NATION

JAMES W. FLETCHER

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VINCENT X. LEE
Petitioner,

v.

STATE OF MISSOURI
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE MISSOURI SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CASES

State v. Vincent X. Lee, 556 S.W.2d 25 (1977);

Department of Banking v. Pink, 317 U.S. 264 (1942);

Foreman v. U.S., 361 U.S. 416 (1960);

Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32 (1966);

Taylor v. Louisiana, 419 U.S. 522 (1975);

State v. Duren, 556 S.W.2d 11 (1977);

U.S. Const. amend. VI;

U.S. Const. amend XIV;

Art. 1, § 22(b), Mo. Const.;

Section 494.020, RSMo 1969;

Section 494.031, RSMo 1969;

Chapter 497, RSMo 1969.

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BRIEF FOR RESPONDENT IN OPPOSITION

_____

OPINION BELOW

The opinion of the Missouri Supreme Court is reported at 556 S.W.2d 25. A copy of that opinion appears in the petitioner's Appendix A.

JURISDICTION

On September 27, 1977, the Missouri Supreme Court issued an opinion affirming the petitioner's conviction for two counts of robbery and two counts of murder in the first degree. Thereafter, on September 29, 1977, petitioner filed a timely motion for rehearing. Petitioner's motion for rehearing was overruled by the Missouri Supreme Court on October 11, 1977. The petitioner subsequently filed this petition for writ of certiorari on January 16, 1978. United States Supreme Court Rule 22 provides that a petition for writ of certiorari to review a judgment of a state court is untimely unless it is filed within ninety days after the entry of that judgment. This rule has been interpreted to mean that a petitioner has ninety days from the denial of his

timely motion for rehearing to file a petition for writ of certiorari. Department of Banking v. Pink, 317 U.S. 264 (1942); Foreman v. U.S., 361 U.S. 416 (1960). Since the petitioner's motion for rehearing was denied on October 11, 1977, the petitioner had until January 9, 1978, to file a timely petition for writ of certiorari. His petition is therefore untimely. While it is true that Supreme Court Rule 22 is not jurisdictional and this Court has authority to review this case, it should not in view of the fact that no good cause has been shown for the petitioner's failure to comply with Supreme Court Rules. Cf. Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32 (1966).

QUESTION PRESENTED

Was the petitioner's right to a fair trial denied because the Missouri Constitution gives women the right to avoid jury duty by requesting an exemption?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment and the Fourteenth Amendment to the United States Constitution, Article I, Section 22(b) of the Missouri Constitution, Section 494.020, Section 494.031 and Chapter 497 of the Missouri Revised Statutes 1969. These constitutional provisions and statutes are set out in full in the respondent's Appendix A.

STATEMENT

The petitioner Vincent X. Lee was convicted of two counts of robbery in the first degree and two counts of murder in the first degree in connection with a robbery at a 7-11 Store in Independence, Missouri. Prior to his trial the petitioner filed a motion to quash the jury venire claiming that it had not been drawn from a representative cross-section of the community because of the operation of Article I, Section 22(b) of the Missouri Constitution. In support of his motion the petitioner introduced evidence to show that women comprised 54.4% of the population in Jackson County, Missouri; that of the 300 persons called to jury service for the week of petitioner's trial, 88 were women; that

petitioner's jury venire of 90 had 9 women; and the petit jury of 12 was totally male. Petitioner also introduced evidence that the percentages of women who appeared for jury service in the months preceeding his trial were as follows: June - 15.9% women; July - 15.1% women; August - 13% women; September - 13.7% women; and October - 10.9% women. The petitioner also submitted the testimony of John Fitzgerald, the Jackson County jury commissioner, and Robert J. Kramer, the director of data processing for the Sixteenth Judicial Circuit of Missouri, to indicate how jurors were selected to serve in Jackson County, Missouri. The petitioner's motion to quash the jury was overruled.

The petitioner's conviction was appealed to the Missouri Supreme Court and heard in conjunction with State of Missouri v. Minor, State of Missouri v. Duren, and State of Missouri v. Harlin, since each of these cases also raised the question of whether Article I, Section 22(b), of the Missouri Constitution operates to exclude women from jury duty resulting in jury panels which do not represent a fair cross-section of the community.

On September 27, 1977, the Missouri Supreme Court affirmed the petitioner's conviction holding that Article I, Section 22(b) of the Missouri Constitution does not exclude women from jury duty and that the jury panel from which the petitioner's jury was chosen did represent a fair cross-section of the community. Similar opinions were returned in Duren, Harlin and Minor. Petitions for writ of certiorari have also been filed in those cases.

In order to fully understand the question presented by this case, it is necessary to consider the jury selection system which is employed in Jackson County, Missouri. That system is mandated by Section 494.031, Section 494.020, and Chapter 497 of the Revised Statutes of Missouri 1969, and Article I, Section 22(b) of the Missouri Constitution. Each of these provisions appears in respondent's Appendix A.

The jury selection system in Jackson County begins with the voter registration list. From that list the jury commissioner

selects at random by computer approximately 70,000 names. A questionnaire is then sent to each individual selected. A copy of that questionnaire appears in Section 497.130, RSMo Supp. 1975, respondent's Appendix A. Among other things, that questionnaire notifies women of their right to be excused from jury duty. When these questionnaires are returned, the jury commissioner eliminates all individuals whose questionnaire indicates that they have exercised their right to be excused or that they are unqualified to serve as jurors.* The remaining pool of names is then entered into a computer and 25,000 names are randomly selected for the master jury wheel. If an individual fails to return the questionnaire then the individual's name is automatically included in the pool from which the master jury wheel is selected. In Jackson County a new jury wheel is prepared each year.

Individuals are periodically selected from the master jury wheel by computer to make up the general jury panel for all civil and criminal divisions of the Jackson County Circuit Court. Jury summonses are sent out to each one of those individuals randomly selected from the jury wheel. These summonses notify women that they have a right to be excused from jury duty. After receiving the summons, the individual is given an opportunity to present to the circuit court reasons why he or she would be unable to serve as a juror. All jurors who are not excused should appear in the circuit court for jury duty. If a woman does not appear, it is assumed that she has exercised her right not to serve. Venire panels are then randomly selected from the individuals

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* In order to promote an orderly and efficient judicial system, certain individuals are excluded from jury service by Section 494.020, RSMo Supp. 1975. For example, licensed attorneys and those unable to understand the English language may not serve on juries in Missouri. Section 494.031, RSMo Supp. 1975, on the other hand, allows certain individuals to be excused from jury duty if they make a timely application to the court; for example, persons over 65, doctors of medicine, school teachers, government workers, or clergy. Also, Article I, Section 22(b) mandates that a court shall excuse any woman who requests exemption before she is sworn.

which have appeared for jury duty and the petit jury is selected from the venire panel.

ARGUMENT

I

The Missouri Supreme Court's decision in State of Missouri v. Vincent X. Lee is not in conflict with this Court's decision in Taylor v. Louisiana, 419 U.S. 522 (1975).

In Taylor v. Louisiana, supra, this Court held that the jury selection system employed by the State of Louisiana deprived criminal defendants of their right to an impartial trial. La. Const. Art. VII, Section 41 (since repealed), sets out the constitutionally offensive procedure:

> "The legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no women shall be drawn for jury service unless she shall have previously filed with the clerk of the district court a written declaration of her desire to be subject to such service. . . ."

This Court pointed out that this provision operated to systematically exclude women from jury service, and therefore, deprived criminal defendants of a jury composed of a fair cross-section of the community.

On the basis of the Taylor decision, the petitioner argues that he was deprived of his right to a fair trial because Article I, Section 22(b) of the Missouri Constitution allows women to avoid jury duty by requesting an exemption. The Louisiana constitutional provision cited and Article I, Section 22(b) of the Missouri Constitution, however, are readily distinguishable. In Louisiana a woman was not eligible for jury service unless she took affirmative steps to inform the court of her desire to serve as a juror. In Missouri, on the other hand, women are automatically included in the jury list. They are excused from jury service only when

they take affirmative steps to notify the court that they do not wish to serve. The Missouri system of jury selection, therefore, does not exclude women. It merely allows an exemption for those who choose to exercise it. In this Court's opinion in Taylor, it stated that ". . . jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Taylor v. Louisiana, supra at 538 (emphasis added) The petitioner relies heavily on this language in Taylor and yet it is evident from Article I, Section 22(b) of the Missouri Constitution that women in no way are excluded by the State of Missouri from serving on juries. They are not in any way even remotely inhibited from serving on juries. It is solely their decision as to whether they will exercise their right to be excused.

Taylor v. Louisiana also indicates that a defendant must show that the jury wheels from which juries are chosen fail to reasonably represent a cross-section of the community. Petitioner has asserted that he has met the burden of proof imposed by Taylor v. Louisiana. In Taylor v. Louisiana, however, the evidence showed that no more than 10% of the persons on the master jury list were women, that only twelve women were among the 1,800 persons drawn to fill petit jury venires during the period when the defendant was tried; and that the 175 member venire from which the defendant's petit jury was in fact drawn had no women on it. In contrast, the petitioner's own evidence shows that 29.3% of the persons called for jury duty for the week of November 17, 1975, the time of his trial, were women, and that the 53 member venire from which the petitioner's jury was chosen contained 5 women. This composition could hardly be characterized as almost totally male, the standard enunciated in Taylor v. Louisiana. It seems clear that the situation in Taylor v. Louisiana, supra, was an extreme case which resulted from the state's requirement that women take affirmative steps to participate in the jury selection process, effectively excluding women from jury service. Such is not the case in Jackson County, Missouri.

II

This case is plagued with evidentiary problems which will prevent this Court from reaching the question of whether the defendant's right to a fair trial has been denied.

The petitioner alleges that the female jury exemption in Missouri causes gross underrepresentation of women on jury panels. The record in this case, however, does not show that there is any relationship between Article I, Section 22(b), and the alleged underrepresentation of women on juries in Jackson County. First, the petitioner has failed to present eligible population statistics. At the hearing on his motion for new trial, the petitioner introduced the 1970 United States census figures which show that Jackson County had approximately 407,000 inhabitants over 21 years of age and 54% of those inhabitants were women. The annual Jackson County jury selection process, however, begins with the current voter registration list. No proof was made that the sexes register to vote in direct relation to their numbers or that there has not been a significant change in the makeup of Jackson County, Missouri, between 1970 and 1975 when the petitioner's jury was selected. As stated by the Missouri Supreme Court in State v. Duren, 556 S.W.2d 11 (1977):

> "All of this suggests that statistics of current 'eligible population' referred to in Alexander v. Louisiana, supra, not six year old gross population figures, provide the proper starting point."

More importantly, the petitioner has failed to produce any evidence to show that the percentage of women who actually appeared in court for jury service was less than the percentage of women initially summoned for jury service because a substantial number of women exercised their right to drop out of the jury process solely because of their sex. Section 494.020, RSMo Supp. 1975, provides exemption for groups other than women For example, clergymen, doctors, teachers, dentists, or any person over sixty-five years of age are also entitled to automatic exemption from

jury service. It is possible that the alleged disparity between the number of men and women on the petitioner's venire resulted from women exercising occupational or physical exemptions. Furthermore, the petitioner has failed to show that this numerical disparity was not the result of random chance. Hence, the petitioner's statistical evidence, standing alone, fails to show that the petitioner's jury was not drawn from a representative cross-section of the community because of the number of women who exercised their right to excuse themselves from jury service solely on the basis of their sex.

In Taylor v. Louisiana, supra at 524, the parties stipulated that the "discrepancy between females eligible for jury service and those actually included in the venire was the result of the operation of the Louisiana Constitution." No similar stipulation has been made in this case.

III

The scope of the question presented by this petition is so narrow that a decision by this Court will have little application.

Only the State of Missouri and the State of Tennessee still allow women an exemption from jury duty and the only place in the State of Missouri that this issue has been raised is in Jackson County, Missouri. No complaint has been heard from any other part of the State of Missouri, although this issue has been well publicized. The scope of this petition therefore is so narrow that review by this Court is not warranted.

CONCLUSION

Wherefore, respondent respectfully requests this Court to deny the petitioner's writ of certiorari to the Missouri Supreme Court.

Respectfully submitted,

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THE APPENDIX WAS NOT OF PHOTOGRAPHIC QUALITY AND THEREFORE HAS NOT BEEN FILMED.

see

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